BANK UTAMA (MALAYSIA) BERHAD

v.

SISTEM BIS KOMPUTER SDN. BHD & 3 ORS.

HIGH COURT MALAYA, SHAH ALAM
DATO' JAMES FOONG J.
[CIVIL SUIT NO. 22-297 OF 1990]
4 FEBRUARY 1994

PRACTICE & PROCEDURE: Notice of appeal - Notice filed two days out of time - Enlargement of time - Application for enlargement of time made one and half years later - Whether delay reasonable - Whether application to be granted - Principles to be applied - Order 3 r. 5(1) Rules of the High Court 1980.

On 30 June 1992 the Senior Assistant Registrar (SAR) dismissed the plaintiff's application to enter final judgment against the defendants. Subsequent to that, on 8 July 1992, the plaintiff filed a notice of appeal to the Judge. Order 56 r. 1(3) Rules of the High Court 1980 (RHC) required the filing of such notice to be made within five days of the SAR's decision and therefore, by filing the said notice on 8 July 1992, the plaintiff were two days out of time. This situation remained until about one and half years later when the plaintiff's new solicitors realised that on account of the late filing, an application for enlargement of time ought to be made. The plaintiff hence applied for an order that they be granted enlargement of time to file the said notice and the issue was whether on the facts, and bearing in mind particularly that the RHC does not itself set a time frame for the making of such application, the application of the plaintiff herein ought to be granted.

Held:

[1] The principles to be applied for the consideration of whether to grant or refuse an application of this nature are (1) the length of the delay (2) the reasons for the delay (3) the chances of the appeal succeeding if time for appeal is extended and (4) the degree of prejudice to the respondent if the application is granted.

[2] In this case two stages are involved. The first being the plaintiff filing the notice of appeal two days out of time and the second involves the plaintiff making this application for enlargement of time about one and half years later. When a Court of law considers such an application of this nature the facts and circumstances relating to both the delay in filing the notice of appeal and the application for enlargement of time must be taken into account and the four principles aforesaid should be considered equally in both situations and as a whole.

[3] A notice of appeal may be filed two days late, but in law it is still a defective notice. What is essential then is for the party concerned to take immediate steps to file an application for enlargement of time to file notice of appeal, and when such an application is granted, to file a notice of appeal out of time. This the plaintiff did not do.

[4]Though no time limit is specified in the RHC for the filing of this application, by natural justice such application should be made within reasonable time. The plaintiff's application herein, made almost one and half years after the intention to appeal, is unreasonable. The reason given by the plaintiff that the delay was due to the mistake of its previous solicitors cannot and does not justify the grant of extension of time. In addition the delay had also prejudiced the defendants. For one and half years they were in bliss that an O. 14 application for final judgment had been decided and determined.

Allowing the plaintiff's application would mean that the defendants again have to defend such application at appeal level.

[Application dismissed].

Cases referred to:
Development & Commercial Bank Bhd. v. Tan Ong Hwa [1992] 2 MLJ 764
Tractors Malaysia Berhad v. Southern Estates Sdn. Bhd. & Anor. [1984] 1 CLJ 154/[1984] 1 MLJ 118 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5(1), O. 56 r. 1(3)

For the plaintiff - W.M. Chang; M/s. Raja Darryl & Loh
For the defendant - Siva; M/s. Cheah Teh Sae

JUDGMENT

James Foong J:
This is an application (enclosure 51) by the plaintiff for *inter alia* the following orders:

(a) that the plaintiff's be granted enlargement of time to file notice of appeal against the decision of the Senior Assistant Registrar granted against the plaintiffs' on 30 June 1992 and/or,
(b) that the notice of appeal dated 8 July 1992 filed by the plaintiff against the said SAR's decision be treated as filed within time.

The facts of this case are as follows. On 30 June 1992, the Senior Assistant Registrar dismissed the plaintiff's application to enter final judgment against the defendants. The dismissal was apparently on a preliminary issue taken by the defendants. The plaintiff's solicitor then filed a notice of appeal to the Judge on 8 July 1992. Under O. 56 r. 1(3) of the High Court Rules, the time limit to file this appeal must be within 5 days from date of the SAR's decision. By filing the notice of appeal on 8 July 1992, the plaintiff were 2 days out of time. This situation remain as it was for almost 1 1/2 years until the plaintiff's new solicitors realised that an application should be made for enlargement of time since the notice of appeal was filed out of time. To remedy this situation, they are now making this application.

The main reason given by the plaintiff for the delay in filing the notice of appeal is that they required instructions to appeal from their head office in Sarawak. By the time this instruction for appeal came through, they were 2 days late in filing the notice of appeal. Further, the plaintiff's seem to blame their previous solicitors for not making this application for enlargement of time as soon as possible. Nevertheless, the plaintiff's Counsel argued that no where in the High Court Rules, is there a time frame set for making this application.

The plaintiff's Counsel also submitted that under O. 3 r. 5(1) of the High Court Rules, this Court may order extension or abridgement time.

After hearing submissions by both Counsel and after considering the facts of this case and the authorities as tendered by both parties, I dismissed the plaintiff's application.

The principles to be applied for the consideration of whether to grant or refuse an application of this nature are as follows:

(1) the length of the delay;
(2) the reasons for the delay;

(3) the chances of the appeal succeeding if time for appeal is extended;
(4) the degree of prejudice to the respondent if the application is granted. (See the case of *Development & Commercial Bank Bhd. v. Tan Ong Hwa* [1992] 2 MLJ 764).

However in this case, 2 stages are involved. The first being the plaintiff filing the notice of appeal 2 days out of time and the second, involves the plaintiff making this application for enlargement of time about 1 1/2 years later. For the latter, as submitted by plaintiff's Counsel there is no time limit.

In the case of *Development & Commercial Bank Bhd. v. Tan Ong Hwa* when the notice of appeal was filed out of time, it was rejected by the Court officials. This lead the applicant in that case to file an application for enlargement of time about $2^1/_2$ months later. In this present case, there was no rejection of the notice of appeal filed out of time. Presumably, the plaintiff only became aware of the necessity to make an application for enlargement of time when the new solicitors took over this matter much later.

When a Court of law considers such an application of this nature the facts and circumstances relating to both the delay in filing the notice of appeal and the application for enlargement of time must taken into account and the principles as stated in the D & C Bank case should be considered equally in both situations and as a whole. This would mean that this Court should also consider the length and reason for the delay in filing the application for enlargement of time in this case and, whether this lateness in application would prejudice the respondent.

Though no time limit is specified in the Rules of High Court or by any statute for the filing of an application for the enlargement of time to file a notice of appeal, by natural justice such application should be made within reasonable time. What is reasonable would depend on the circumstances. A notice of appeal may be filed 2 days late, but in law it is still a defective notice. What is essential then is for the party concerned to take immediate steps to file an application for enlargement of time to file notice of appeal out of time. The longer the delay in the filing of an application of such a nature the greater is the likelihood of prejudice to the opposite party. It is no point to keep a defective notice of appeal though filed only a few days late and make an application for enlargement of time many years later. The correct procedure is of course not to file any defective notice of appeal when a party is out of time.

An application should first be made for enlargement of time to file notice of appeal and when such an application is granted, then only should a notice of appeal out of time be filed. Unfortunately as in many cases, parties only become aware of a defective notice filed out of time after having filed the same. When an application for enlargement of time is made, the defective notice of appeal when it was filed is often used as a piece of evidence to indicate the length of the delay. As I have stated earlier, consideration must not only be limited to when a party decides to file this appeal but, also as to when a proper application is made for enlargement of time to file notice of appeal out of time.

Based on the facts and circumstances of this case, I find that this application (Enclosure 51) made almost $1^1/_2$ years after the plaintiff's intention to appeal is unreasonable. The reason for the cause of this delay was, as expressed by the plaintiff's Counsel due to the mistake of the plaintiff's previous solicitors. Such error on a point of law cannot constitute sufficient ground for the granting of an extension of time to the filing of a notice of appeal. (See *Tractors* [1984] 1 MLJ 118.) Further, the decision of the Senior Assistant Registrar which the plaintiff wish to appeal against is on an O. 14 application

for final judgment against the defendants. One of the essential ingredients of such an application is the time factor. Any delay in the making of this application would render it defective.

Concurrently, a delay of $1^{1}/_{2}$ years to make this application which is against a decision of an application where time was essential, would defect the principle of urgency in that very application itself. This would certainly cast grave doubts on the probability on the success of this appeal.

The defendants in this case are certainly prejudiced. For $1^{1}/_{2}$ years they were in bliss that an O. 14 application for final judgment had been decided and determined. Now they have to again defend such an application at an appeal level if this application for enlargement of time is allowed.

I am at loss as to why the present solicitors of the plaintiff care to pursue this application to set aside asking for even further argument. As the decision appealed against is on a summary judgment under O. 14, the plaintiff would be better off in accepting the decision of the learned Senior Assistant Registrar and set this case for hearing. In my opinion, by now this case if set down for trial immediately after the Senior Assistant Registrars decision would most likely be heard and disposed off at a full hearing.

I therefore dismiss the plaintiff's application with cost.